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8 LLC

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 ROOTS READY MADE GARMENTS CO.
W.L.L.,

14 Plaintiff,

15 v.

16 THE GAP, INC., a/k/a, GAP, INC., GAP
17 INTERNATIONAL SALES, INC., BANANA
REPUBLIC, LLC, AND OLD NAVY, LLC

18 Defendants.
19

Case No. C 07-03363 CRB

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S APPLICATION
PURSUANT TO LOCAL CIVIL RULE 7-9
FOR LEAVE TO FILE MOTION FOR
RECONSIDERATION**

Dept: 8
Judge: Honorable Charles R. Breyer

Trial Date: October 6, 2008

1 Gap submits this brief opposition to Roots' request for leave to file a motion for
2 reconsideration to point out that (1) Roots is asking this Court to reconsider a "Fraudulent
3 Concealment Claim" that it has never alleged, much less alleged with particularity; and (2)
4 contrary to Roots' assertions, because the parol evidence rule bars Roots' claim that Gap
5 promised to grant Roots distribution rights under the ISP program, it also bars Roots' claim that
6 Gap fraudulently concealed the "nature and purpose" of that program.

7 In its request for leave, Roots speculates that because this Court did not specifically
8 address Roots' assertion in its summary judgment opposition that Gap "misrepresented the
9 nature and purpose of the ISP program by failing to disclose that the program was intended to
10 protect Gap's trademarks and 'not to drive revenue or sales,'" the Court "fail[ed] to consider"
11 this "Fraudulent Concealment Claim." Roots' Req. at 2:3-13. Roots then asserts that the Court's
12 explicit rulings in its summary judgment order have "no application" to the Fraudulent
13 Concealment Claim. *Id.* at 16-19. Neither of Roots' contentions has merit.

14 **First**, Roots is complaining that this Court "failed" to consider a fraud claim that Roots
15 has never even alleged. Roots did not plead its so-called "Fraudulent Concealment Claim" in
16 any of the several complaints it has filed in this action. Roots' request that this Court reconsider,
17 on the eve of trial, a claim that Roots never alleged is especially inappropriate given that Roots is
18 required to plead its "Fraudulent Concealment Claim" with particularity. Fed. R. Civ. P. 9(b).

19 **Second**, even if the "Fraudulent Concealment Claim" had been alleged, and alleged with
20 particularity, it was unnecessary for the Court to specifically address the claim in its summary
21 judgment order, and is unnecessary for the Court to reconsider it now, because the claim
22 necessarily fails in light of the Court's express rulings on summary judgment. As established in
23 *Limandri v. Judkins*, 52 Cal. App. 4th 326 (1997), the very case on which Roots relied when it
24 first asserted its "Fraudulent Concealment Claim" in its opposition to Gap's motion for summary
25 judgment, to state a claim for fraudulent concealment, the fact allegedly concealed must be
26 *material*, and there must be *some relationship* between the parties which gives rise to a duty to
27 disclose that fact. *Id.* at 337; Roots' MSJ Opp. at 21:20-7 (citing *Limandri*). "As a matter of
28 common sense, such a relationship can only come into being as a result of some sort of

1 *transaction* between the parties.” *Limandri*, 52 Cal. App. 4th at 337 (emphasis in original).

2 Thus, in *Limandri*, the court rejected a fraudulent concealment claim where there was no
3 transaction between the parties giving rise to a duty of disclosure. *Id.*

4 Here, Roots’ “Fraudulent Concealment Claim” fails as a matter of law because Roots
5 cannot prove either materiality or the requisite transaction without violating the parol evidence
6 rule. Roots’ only argument for why Gap’s alleged “concealment” was material was that
7 “[b]ecause the ISP rights were to be the sole consideration exchanged for Roots’ \$6M payment
8 to Gap, the fact that the ISP program was intended for trademark protection, not commercial
9 profit, was highly material.” Roots’ Opp. to MSJ at 21:7-9. As this Court recognized at the
10 outset of this case, however, “Roots’ claim that it purchased Gap’s OP in exchange for ISP rights
11 contradicts the express contracts between Gabana and Gap providing that Gabana would
12 purchase the OP and sell it directly to retailers or not at all.” Oct. 18, 2007 Order at 2:28-3:2.
13 And the only transaction in which a duty to disclose the alleged “true nature” of the ISP program
14 could possibly arise is the very transaction that this Court has held that Roots cannot prove
15 because of the parol evidence rule—Roots’ alleged purchase of ISP distribution rights.

16 Thus, the Court’s ruling that the parol evidence rule bars Roots’ allegation that Gap
17 promised to grant Roots ISP distribution rights not only “has [an] application to the Fraudulent
18 Concealment Claim” (Req. at 2:19), it leaves Roots with no way of proving the requisite
19 elements of such a claim—even if Roots were able to obtain leave to amend its complaint to state
20 the claim and do so with particularity, neither of which it has done. Roots’ request, therefore,
21 should be denied.

22 Dated: September 16, 2008

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